Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of **Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules**	**WT Docket No. 99-168**

PETITION FOR RECONSIDERATION and/or CLARIFICATION BY THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

The Association of Local Television Stations, Inc. (hereinafter ALTV) hereby files the following Petition for Reconsideration and/or Clarification in the above captioned proceeding.[1] ALTV represents local television stations across the United States. Our members are predominantly affiliated with the Fox broadcast television network, the WB television network, the UPN television network, the PAX television network, and traditional independent stations. Our members have a direct interest in all policies that affect the 746-764 and 776-794 MHZ

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[1]*Report and Order*, In the Mater of Service Rules for the 746-764 and 77-794 MHz Bands, WT Docket No, 99-168, FCC 00-5, (released January 7, 2000) (*hereinafter Service Rules Report and Order*)

band. Many of our members currently operate on one or more of these frequencies. The FCC's new plan for these channels (60 -69) will have a direct, adverse impact on these stations. Moreover, the FCC's decision will impact all televisions stations, even those not currently operating on these frequencies.

There is no question that the *Service Rules Report and Order* will usher in a new telecommunications service in this portion of the band. In the process of promoting a new service, however, ALTV believes strongly that the FCC has a fundamental obligation to preserve and protect free over- the-air television service operating on Channels 60-69. In this regard, we question whether the procedures established by the FCC are designed to preserve free television on these channels during the transition to digital. Moreover, to the extent the Commission envisions a new service on these frequencies that is similar to broadcast television, then it must adopt an equivalent regulatory regime. In this regard we believe it to be highly inappropriate to enact a regulatory service regime which contemplates a broadcast service, but fails to apply similar regulatory treatment. To the extent the FCC applies a less regulated structure to new broadcast service operating on these channels, then it should accord similar treatment to broadcast stations operating on channels 2 -59.

I. Television Broadcasters Have The Right to Use Channels 60-69 Through the End of the Transition to Digital Television.

While the FCC's decision to reallocate and adopt new service rules for this portion of the band will create a new service, it simply cannot ignore the importance of these channels to the broadcasting industry and to the public. As the FCC concluded in its reallocation order:

> The operation of some TV and DTV stations in this spectrum is clearly required to facilitate the DTV transition; and the Budget Act provides for this, stating "any person who holds a television broadcast license to operate between 746 and 806 Megahertz may not operate that frequency after the date on which the digital television service transition period terminates."[2]

There can be no doubt that analog and DTV station operating on these channels have the right to occupy these channels and remain protected from interference until the *end* of the digital transition. At the very earliest, this would mean stations would not be required to vacate their channels until December 31, 2006. However, a station has the *statutory* right to stay beyond this date if certain market conditions have not taken place. Thus, for example, if the penetration of digital television sets is less than 85 percent of television homes in the station's market, then a station need not give up operating on channels 60-69.[3] This has been the clear understanding

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[2]*Report and Order*, Reallocation of Television Channels 60-69, the 746-806 MHz Band, 12 FCC Rcd. 22953, 22964-22965 (January, 1998)

[3]Section 3003 of the 1997 Budget Act states:

The Commission shall extend the date [of the DTV transition] for any station that requests such extension in any television market of the Commission finds that --

(i) one or more of the stations in such market that are licensed to or affiliated with one of the four largest national television networks are not broadcasting a digital television service signal, and the Commission finds that each such station has exercised due diligence and satisfies the conditions for an extension of the Commission's applicable construction deadlines for digital television service in that market;

throughout the transition. There is nothing in the record that would justify a change in this time honored policy.

While there is no express rejection of this approach in the *Service Rules Report and Order*, there is some indication that the Commission may be trying to force early eviction of free over-the-air broadcast stations operating on these channels. For example, the Commission will entertain voluntary agreements entered into between incumbent licensees and new licensees in this band.[4] In evaluating these agreements the FCC appears willing to tip the scales in favor of new services:

> In considering whether the public interest would be served by approving specific requests, we would, for example, consider the benefits to consumers of the provision of new wireless services, such as next generation mobile services or Internet fixed access services. We would also consider whether such agreements would help clear spectrum for public safety use in these band and could result in

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(ii) digital to analog converter technology is not generally available in such market; or

(iii) in any market in which an extension is not available under clause (i) or (ii), 15 percent or more of the television households in such market:

(I)do not subscribe to a multichannel video programming distributor (as defined in section 602) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and

(II) do not have either -

(a) at least one television receiver capable of receiving the digital television service of the television stations licensed in such market; or

(b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.

[4] *Service Rules Report and Order* at 61.

> the provision of new wireless service in rural and other relatively undeserved communities.[5]

On the other hand the FCC appears to be undervaluing the public interest benefits of providing a free over-the-air television service.

> For example we would consider the availability of the licensee's former analog programming within the service area, through simulcast of that programming on the licensee's DTV channel or distribution of the programming on cable or DBS, or the availability of similar broadcast services within the service area, (e.g., whether the lost service is the only network service, the only source for local service, or the only source for otherwise unique broadcast service.)[6]

Nowhere in this analysis is there a consideration of the unique aspect of providing a free, universally available voice to the public. We believe the FCC must give greater consideration to the importance of free, over-the-air television when conducting its public interest analysis.

Significantly, ALTV is not stating that broadcasters and others may not enter into an agreement to accelerate the transition to digital television. Indeed, there may be instances where such an arrangement benefits the public, incumbent broadcaster and new occupant. Our concern is based on the fact that the *Service Report and Order* provides no guidance when parties to such an agreement may make specific regulatory requests to vacate spectrum. Under no circumstances, should a new occupant be able to force an incumbent television operator to vacate its broadcast channel. The FCC must make it clear that requests for regulatory relief needed to

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[5] *Id.*

[6] *Id.*

implement "voluntary agreements" will be considered only when *both* parties have voluntarily filed for such relief.

Under no circumstances should one of the parties be able to file unilaterally for implementation of an agreement to vacate a channel. In such a circumstance, the party seeking relief is simply trying to inject the FCC into a private negotiation. The Commission should not be placed in a position to influence the outcome of these negotiations. Injecting itself into these discussions will result in an endless cycle of government involvement tying up valuable Commission resources. Thus, if an incumbent broadcaster does not want to sell its channel to the new occupant, it should not be forced to do so.

Moreover, an incumbent broadcaster should not have its decision to continue operating on its channel second guessed by a new occupant or the Commission during the transition. By statute, operating a broadcast station on these channels during the transition to digital is clearly within the public interest. Such operation should not become subject to an expensive FCC inquiry simply because a new occupant wants the broadcaster to vacate its channel.

Finally, ALTV recognizes that the FCC can influence these negotiation by adopting a variety of rules and regulations that affect broadcast operations on these channels. Such rules could certainly affect the outcome of any negotiations that may take place. For example, revising the interference protections could force local stations to vacate their channels. At this point the FCC has not overtly attempted to manipulate the process. Nonetheless, rule changes that are designed to force stations to vacate these channels early would, in our opinion, run afoul of statutorily mandated timetable for the transition to digital television.

II. The FCC Should Endeavor to Create Regulatory Parity For All Broadcast-Type Services

While the technical requirements of the proposed new services are different from existing broadcast services, the *Service Rules Report and Order* permits broadcast services on this spectrum.

> Although we have determined to orient our technical and service rules primarily to enable the efficient and intensive use of these bands for wireless service, we will nonetheless allow any broadcast-type services consistent with the Table of Allocations that meet those rules.[7]

While the FCC recognizes that new broadcast services will be permitted to operate on these frequencies, it has declined to determine whether the statutory and regulatory regime that now applies to broadcast television will be applicable to new broadcasting operations.

> There is little record comment on the appropriate regulatory treatment for new broadcast-type services, although several commenters note that different considerations inform the regulatory structures for broadcast services and non-broadcast services. However, we cannot anticipate the nature of those broadcast services that may be developed in the future for use of this spectrum in conformance to the power limits and band configurations adopted in this order. While we do not make specific determinations here regarding any new broadcast-type services, we remind potential applicants that certain broadcast regulations are mandatory as a matter of statute and they must apply to such services. The provision of new broadcast-type services compliant with part 27 technical

[7]*Service Rules Report & Order* at 11.

standards does not alter the underlying nature of such services, or the licensee's related regulatory and statutory obligations.[8]

The Commission concedes that the services provided over these frequencies may fit the statutory definition of broadcasting, which is "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."[9] However, the FCC declines to anticipate or adopt a specific regulatory framework.[10]

Significantly, ALTV is not necessarily urging the FCC to impose specific regulations on new occupants of this portion of the band, *per se.* Nonetheless, it is simply arbitrary for the FCC to apply a set of rules to one set of broadcasters and fail to apply the same rules to other broadcasters.[11] Moreover, by failing to establish specific rules, the FCC has failed to consider the effect of its policies on the competitive conditions in broadcast and video markets.[12] Finally, the FCC is obligated to inform potential auction participants of the rules which will govern their purchase. Such rules could have a dramatic affect on the price of spectrum. The failure to inform participants in advance could be reversable error.

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[8]*Service Rules Report and Order* at 20 n.95

[9]47 U.S.C. §153(6)

[10]Service Rules Report and Order at 9 n.37

[11]*See e.g., Melody Music*, 22 RR 870 (1952)

[12]*See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

As the FCC acknowledges, broadcast services operating on these frequencies are subject to the same statutory obligations as current broadcasters. Accordingly, content requirements such as access for federal political candidates (§312 (a)); equal opportunities for candidates (§315); and children's programming (§ 303(a)) would be applicable. Unfortunately, the *Service Rules Report and Order* fails to explain how these statutory provisions will be applied to broadcast-type services operating on these frequencies. The application of other statutory provisions are more problematic.[13]

For example, §307(c)(1) of the Act establishes a statutory eight year license term. The *Service Rules Report and Order* establishes a longer license term, extending eight years beyond the date for digital transition. The *Service Rules Report and Order* states that an applicant choosing to operate as a broadcaster will be subject to the eight year license term. No provision is made, however, for the situation where, through disaggregation or partition, the applicant assigns the spectrum to an entity that operates as a broadcaster. Assuming such an assignment is legal, will the broadcast operator be subject to the eight year license term, or can it use the spectrum until January 1, 2014? Moreover, does the disaggregation or partitioning of spectrum to a third party constitute the transfer of a broadcast license under §310 of the Act?

[13]One interesting statutory question is whether the new broadcast services operating on these frequencies constitute a form of advanced television services, thereby triggering the spectrum fee provisions under §336 of the Act.

Another issue is the petition to deny process. Pursuant to §309(d), parties have no less than 30 days from the date of issuance of a public notice to file a petition to deny. The *Service Rules Report and Order* attempts to apply the seven day petition to deny process which is applicable in the auction context under Section 309(j). However, it is not evident that the Commission has the statutory authority to waive the 30 day requirement in a situation involving a full service broadcast station whose application is not mutually exclusive to another. Again, the problem becomes more complex if the licensee partitions or disaggregates its spectrum. Will the petition to deny process apply to the ultimate entity that engages in the broadcast business in a local community?

These are just a few of the statutory hurdles that must be clarified by the Commission. The FCC is obligated to apply the statutory requirements in a consistent and rational manner. It cannot treat similar services differently. Importantly, the FCC must conclude that the statutory requirements apply not only to the licensees themselves, but also to the designated entities that actually operate broadcast facilities. Licensees of these frequencies should not be able to escape FCC oversight simply by disaggregating their spectrum to other "third parties" that decide to operate as broadcasters.

Aside from the statutory requirements, FCC regulations should be applied in an even manner.[14] For example, under the new service rules an applicant may own 20 megahertz of

[14]The FCC does state that broadcast EEO obligations would apply to entities operating broadcast facilities on this newly auctioned spectrum. *Service Report and Order* at 40.

spectrum. The same licensee could also bid on a separate 10 Mhz block of spectrum. Thus, an entity can control wither 10 Mhz, 20 Mhz or if it purchases both blocks of spectrum 30 Mhz of spectrum in multi-state region. Indeed, the six regions adopted by the Commission are enormous, covering vast areas of the United States.

Compare this proposed structure to the existing broadcast environment. Under the new service rules only one entity can own 20 Mhz of spectrum in a single market, regardless of market size. However, pursuant to the new local broadcast ownership rules, a single entity is permitted to own only 12 Mhz of spectrum (two stations) in the largest markets. In the smaller markets, broadcasters may only own 6 Mhz of spectrum absent a waiver of the existing rules.[15] Such a disparity gives the new broadcast operators a considerable advantage in harnessing efficiencies and acquiring programming. Maintaining such a disparate regulatory regime is simply unfair to existing television station operators.

The application of a consistent regulatory regime becomes even more complex given the FCC's decision to permit licensees to disaggregate and/or aggregate their spectrum holdings.

However, to the extent the owners of such spectrum can encompass areas as large as the west coast, the FCC offers not guidance as to how it EEO policies, which are based on a market by market approach, would be applied to such owners. Also, there is not indication whether the EEO rules would be applied to an entity that leases spectrum from the licencee and operates a broadcast facility in a particular market.

[15] *Report and Order, Review of Commission Regulations Governing Broadcasting and Television Satellite Stations*, MM Docket No. 91-221, 87-8, FCC 99-209 (released August 6, 1999).

While this process may have worked well with similar CMRS services,[16] such an approach is inapplicable when disparate services are involved. Indeed, there is little or no discussion in the *Service Rules Report and Order* as to how partitioning and disaggregation would apply where the licensee is partitioning its spectrum into different services. For example, assume a winning bidder partitions and disaggregates its spectrum, and permits a third party to operate a broadcast facility on that spectrum. Does the current broadcast regulatory regime, 47 C.F.R. Part 73.000 *et seq*, apply to the entity holding the license or its assignee? Alternatively will the assignee of the partitioned spectrum be individually responsible for complying with the Commission's broadcast rules?

Unfortunately, the *Service Rules Report and Order* simply glosses over these extremely difficult issues. It simply admonishes potential applicants that the broadcast rules could apply, without discussing them in detail. We believe that such a cavalier approach is entirely unfair to incumbent broadcasters. It is entirely possible that existing television station licensees could be facing tremendous competition from broadcasters that are not subject to the same regulatory regime. In this regard, black letter administrative law requires the FCC to apply equal treatment to both licensees.

The FCC justification for not establishing specific broadcast operating rules for these frequencies is without merit. The *Service Rules Report and Order* states:

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[16] *Report and Order , Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, 11 FCC Rcd. 21831 (December, 1996)

> Because such new broadcast-type services on these bands will necessarily use lower power levels than even existing low power television service, and may differ significantly in both technical and public policy respects from conventional broadcasting, we have not sought to anticipate or develop a regulatory framework, beyond the technical the operational rules we adopt in this Report and Order or that already apply to broadcast services generally.[17]

ALTV respectfully submits that the Commission's justification is unpersuasive. From a statutory standpoint broadcasting is broadcasting. Statutory obligations apply based on function, *i.e.*, how the spectrum is being used, not the level of power. If it is used for broadcasting purposes, then broadcast rules should apply. The same should hold true for the application of non-statutory FCC rules. Indeed, Congress just determined that the full panoply of broadcast rules and regulations should apply to those low power stations that have achieved Class A status.[18]

We also note that uncertainty regarding future technology or business plans has never prevented the FCC from attempting to enact new regulations. Indeed, if this justification is valid, then the FCC should refrain from attempting to enact a regulatory regime on new digital broadcast channels. Of course the Commission has taken the opposite approach, attempting to apply a specific regulatory regime on digital television today.[19]

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[17]*Service Rules Report and Order* at 9, n.37.

[18]Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), *codified*, 47 U.S.C. §336(f)

[19]*Notice of Inquiry, Public Interest Oblighation of TV Broadcast Licenses,* MM Docket No. 99-360, FCC-99-390 (released December 20, 1999).

Finally, it is incumbent on the FCC to provide a more detailed outline of the proposed broadcast regime prior to the auction. Parties wishing to operate broadcast type services on this spectrum deserve to know the regulations they may face. Such regulations, if any, may have a dramatic impact on the value of the spectrum that is being auctioned. Indeed, the FCC may be hard pressed to apply new regulations on spectrum use after the auction has taken place.

III. Conclusion

The *Service Rules Report and Order* directly impacts all incumbent local television stations. The FCC should not attempt to squeeze incumbent broadcasters off channels 60 to 69. These stations have a statutory right to occupy these channels through the end of the digital transition. New occupants should not be able to force stations off these channels. The FCC should only evaluate private agreements to vacate these channels if, and only if, both party have reached agreement.

The Commission should apply consistent statutory and regulatory treatment for all broadcast licensees. New occupants of these channels should operate under the same regulatory regime as all other broadcast television stations. To the extent the FCC decides to employ less restrictive rules to broadcasters operating on these frequencies, then similar, less onerous, rules should be applied to all television stations as well.

Respectfully Submitted
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